

Journal of Civil Rights and Economic Development

Volume 15
Issue 1 *Volume 15, Fall 2000, Issue 1*

Article 3

September 2000

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Recommended Citation

Gallegos, Jody L. (2000) "Three Decades of Frustration: Finally, a Solution to the Asbestos Problem," *Journal of Civil Rights and Economic Development*. Vol. 15 : Iss. 1 , Article 3.
Available at: <https://scholarship.law.stjohns.edu/jcred/vol15/iss1/3>

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THREE DECADES OF FRUSTRATION: FINALLY, A SOLUTION TO THE ASBESTOS PROBLEM

INTRODUCTION

The explosion of asbestos personal injury suits filed in the United States during the last three decades has overburdened many state and federal courts.¹ The American civil justice system has thus far proven ill prepared to deal with the demands of such a multitude of claimants, prompting many judges and scholars to call for a national solution to the asbestos crisis.² Although many attempts have been made to resolve this growing problem through proposed legislative action,³ none have garnered enough support to reach enactment.⁴

¹ See H.R. 1283, 106th Cong. § 2 (1999) (finding that state and federal courts are strained by more than 150,000 asbestos suits currently pending in those courts); see also Robert G. Berger, *The Impact of Tort Law and Development on Insurance: The Availability/Affordability Crisis and Its Potential Solutions*, 37 AM. U. L. REV. 285 (1988) (comparing number of asbestos suits and asbestos-related suits); Gregory A. Bibler, *The Status of Unaccrued Tort Claims in Chapter 11 Bankruptcy Proceedings*, 61 AM. BANKR. L.J. 145, 149 (1997) (analyzing toxic torts and asbestos suits in bankruptcy courts). See generally Mark Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 24-25 (1986) (discussing massive increase in filings of asbestos suits); Jack B. Weinstein & Eileen B. Hershenov, *Evidence and Procedure For the Future: The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 322 (1995) (noting that in 1980's congress started to respond to what had been pro-plaintiff legislation in order to deter or mitigate damage to American business).

² See Am. Law Inst., Complex Litigation Project, Various drafts (1987-1990) (discussing asbestos crisis and its specific needs); see also Jeffrey S. Brenner, *Alternatives to Litigation: Toxic Torts and Alternative Dispute Resolution-A Proposed Solution to the Mass Tort Case*, 20 RUTGERS L.J. 779, 805-06 (1989) (recognizing arbitration or negotiation panels as solutions to asbestos crisis); Linda S. Mullenix, *Class Resolution of the Mass Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1046 (1986) (examining federal mass-tort procedure act as best approach for dealing with nationwide litigation crisis); Jack B. Weinstein, *Preliminary Reflections on the Law's Reaction to Disasters*, 11 COLUM. J. ENVTL. L. 1, 42 n.131 (1986) (discussing selection of law clerks with scientific and technical backgrounds to assist work on cases).

³ See, e.g., Radiation Exposure Compensation Act, 136 Cong. Rec. H 3137, Vol. 136 No. 69 (1990) (discussing needs of employees working in asbestos environments); Occupational Disease Compensation Act of 1985, H.R. 3090, 99th Cong., 1st Sess. (1985) (proposing establishment of toxic injury program based on Workers' Compensation framework); Asbestos Workers' Recovery Act, H.R. 1626, 99th Cong. 1st Sess. (1985) (expanding original jurisdiction of federal courts to include mass tort cases meeting given criteria).

⁴ But see Judicial Improvement Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (modifying case management procedures in mass and complex litigation); George Ong, *Directors and Officers Insurance Proceeds in Bankruptcy: The Impact On An Estate and Its Claimants*,

With dockets continuing to swell across the country, it has become clear that the current judicial framework for disposing of these claims is simply too inefficient to dispense justice to all of the parties involved.⁵ The Supreme Court of the United States has thrown up its hands in the face of the "elephantine mass of asbestos cases"⁶ and shifted responsibility for resolving the growing problem onto Congress.⁷ Congress has responded by proposing The Fairness in Asbestos Compensation Act of 1999 (FACA).⁸

The provisions of this act would create the Asbestos Resolution Corporation⁹ (ARC) whose primary function would be to establish medical standards for evaluating asbestos related claims¹⁰ and to facilitate settlement of individual claims through utilization of various alternative dispute resolution (ADR) techniques.¹¹ Under the proposed statutory framework, all asbestos-related personal injury claims not yet settled or adjudicated would be bound to this

13 BANK. DEV. J. 235 (1996) (citing Act to support objective of bankruptcy law and policy); Judith R. Starr, *Bankruptcy Court Jurisdiction To Release Insiders From Creditor Claims in Corporate Reorganizations*, 9 BANK. DEV. J. 485 (discussing relations between Judicial Improvement Act and Bankruptcy Code); Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521, 1562 (1993) (discussing civil justice plans required by Judicial Improvements Act of 1990).

⁵ See H.R. 1283 at § 2 (stating that there are currently 150,000 pending asbestos suits in state and federal courts); see also Emily Eadie, *Metro-North Commuter Railroad Company v. Michael Buckley*, 24 OHIO N.U. L. REV. 609, 614 (1998) (citing American Bar Association account of number of asbestos suits); Francis E. McGovern, *Issues In Civil Procedure: Advancing the Dialogue, A Symposium: Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 665 (1989) (discussing increase in asbestos litigation); Michael Remez, *Court Rejects Railroad Worker's Case Law Denies Right to Sue for Damages Before Onset of Illness*, THE HARTFORD COURANT (Conn.), Jun. 24, 1997, at A3 (stating enormous number of asbestos-related personal injuries currently pending).

⁶ Ortiz v. Fibreboard, 527 U.S. 815, 821 (1999) (quoting Justice Souter who observed that asbestos litigation "defies customary judicial administration and calls for national legislation").

⁷ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure."); see also *W.R. Grace & Co. v. Waters*, 638 So.2d 502, 505 (Fla. 1994) (declaring that uniform solution to problem caused by asbestos litigation can only be effected by federal legislation); *Ripa v. Owens-Corning Fiberglass Corp.*, 660 A.2d 521, 534 (N.J. Super. Ct. App. Div. 1995) (commending asbestos problem to legislature for imposition of more rational solution); *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 196 (Ohio 1998) (stating that there is no problem more in need of legislative solution than that of asbestos litigation).

⁸ See H.R. 1283, 106th Cong. (1999). See also S. 758, 106th Cong. (1999) (pending before the Senate).

⁹ See H.R. 1283 at §§ 101-306 (establishing framework for corporation). But see, John Bell, *Asbestos Companies Try To Eliminate Their Liability*, 35 TRIAL, May 10, 1999 (criticizing proposed legislative effort to curb asbestos litigation through creation of Asbestos Resolution Corporation).

¹⁰ See H.R. 1283 at §§ 201-206 (determining eligibility criteria for all asbestos-related illnesses and employing various techniques for dispute resolution).

¹¹ See H.R. 1283 at §§ 301-06 (providing framework for settlements through mediation and arbitration).

mechanism.¹²

Under this legislation all asbestos cases would pass through the Asbestos Resolution Corporation before being filed in the normal judicial system.¹³ The Corporation's jurisdiction would apply to all asbestos cases, pending or not, unless trial has already commenced in the traditional court system.¹⁴ The legislation further provides that a claimant must exhaust the mandatory ADR mechanisms imposed by the Corporation before suit could be filed in the usual way.¹⁵

This note will examine the Fairness in Asbestos Compensation Act as a possible solution to the ongoing asbestos tragedy continuing to claim victims nationwide. Part I of this note will briefly discuss the development of the asbestos crisis through the last three decades. Part II will illustrate the inadequacies of the available judicial management techniques commonly applied in asbestos cases. Part III will illustrate some of the failed efforts at mass judicial resolution of asbestos claims through class action mechanisms. Finally, part IV will present an argument in support of this legislation as the most equitable solution to the asbestos crisis.

I. THE EVOLUTION OF ASBESTOS LITIGATION

Asbestos has been used in the manufacturing of hundreds of products found in dozens of American industries.¹⁶ Asbestos-containing products in commercial and industrial settings have exposed millions of Americans to the risks of asbestos-related health problems.¹⁷ It was not until Congress passed the Federal

¹² See H.R. 1283 at §§ 701, 702.

¹³ See H.R. 1283 at § 702.

¹⁴ See H.R. 1283 at § 701.

¹⁵ See H.R. 1283 at §§ 201-04.

¹⁶ See *In re Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. 710, 736 (Bankr. E. & S.D.N.Y. 1991) (describing industrial uses for asbestos products); see also DEBORAH HENSLEY ET AL., *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 1 (1985) (discussing common uses of asbestos products); Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1984 (1999) (comparing exposure from asbestos products and breast implants); Richard A. Nagareda, *Turning From Tort to Administration*, 94 MICH. L. REV. 899 (1996) (explaining effects of exposure to asbestos products).

¹⁷ See *In re Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. at 736 (noting that estimates of number of Americans exposed to significant amounts of asbestos are upwards of 21 million); see also Deirdre A. McDonnell, *Increased Risk of Disease Damages: Proportional Recovery as an Alternative to the All or Nothing System Exemplified by Asbestos*, 24 B.C. ENVTL. AFF. L. REV. 623 (1997) (noting increased risk of serious disease based on asbestos cases); Steven L. Schultz, *In Re Joint Eastern and Southern District Asbestos Litigation: Bankrupt and Backlogged - A Proposal For the Use of Federal Common Law*, 58 BROOK. L. REV. 553, 558-59 (1992) (discussing use of asbestos

Occupational Safety and Health Act of 1970¹⁸ that use of asbestos in most industrial settings was prohibited.¹⁹ Those injured through exposure to asbestos products initially found it difficult to obtain relief in the courts.²⁰

*Borel v. Fibreboard Paper Products Corp.*²¹ was the first successful products-liability suit involving a claimant who had been exposed to asbestos.²² In *Borel*, the Fifth Circuit Court of Appeals held that the plaintiff, who had been injured through exposure to asbestos fibers, was entitled to compensation from 11 asbestos manufacturers on a theory of strict liability.²³ This case led to the steady increase of asbestos related personal injury filings across the country.²⁴

products in building, shipping and construction trades throughout America); John A. Siliciano, *Symposium: Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995) (discussing increase in incidence of particular disease by mass exposure cases).

¹⁸ 29 U.S.C. §§ 651-78 (1970).

¹⁹ See Schultz, *supra* note 17, at 560 (discussing effect of passage of Federal Occupational Safety and Health Act of 1970); see also John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356 (1995) (citing Act in reference to restriction to use of any products after 1970); Steven L. Humphreys, *An Enemy of the People: Prosecuting the Corporate Polluter As A Common Law Criminal*, 39 AM. U. L. REV. 311 (1990) (discussing how Act was enacted for purpose of ensuring safe working conditions); Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 136 (1993) (noting how Act did not preempt state criminal prosecutions against defendants in industrial workplaces).

²⁰ See *In re Eastern & Southern Dist. Asbestos Litig.*, 129 B.R. at 745 (noting problems faced early on by asbestos claimants); see also 11 U.S.C. § 101(5) (defining mass future claim as claim arising out of right to payment or equitable relief); *In re Eagle-Picher Indus.*, 203 B.R. 256, 262 (S.D. Ohio 1996) (providing trust adequacy with respect to future claims); Sheldon S. Toll, *Bankruptcy and Mass Torts: The Commission's Proposals*, 5 AM. BANKR. INST. L. REV. 363, 364 (1997) (discussing how Bankruptcy Reform Act of 1994 provides equitable treatment for mass future asbestos claimants in bankruptcy).

²¹ 493 F.2d 1076 (5th Cir. 1973).

²² See Hensler & Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 BROOK. L. REV. 961, 1003-05 (discussing impact of *Borel* on asbestos litigation); see also Jack Berman, *Beshada v. Johns-Manville Products Corp.: The Function of State of the Art Evidence in Strict Products Liability*, 10 AM. J.L. & MED. 93, 100 (1984) (providing that *Borel* established that asbestos producers knew of hazards posed by mineral); Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 171 (1984) (discussing cases relying on *Borel* and issue of asbestos as unreasonable dangerous product); Robert Scott Lewis, *Recent Decision: U.S. Ban Corp Mortgage Co. v. Bonner Mall Partnership: Settlement Condition on Vacatur*, 47 ALA. L. REV. 883, 886 n.22 (1996) (noting *Borel* decision awarded damages of \$58,534.04).

²³ See *Borel*, 493 F.2d at 1103 (holding that "district court's judgment does no more than hold defendants liable for foreseeable consequences of their own inaction"); see also Berman, *supra* note 22, at 100 (providing analysis of *Borel*); Troyan A. Brennan, *Collateral Estoppel in Asbestos Litigation*, 14 ENVTL. L. 197, 204 (1983) (discussing how *Borel* was instrumental in allowing federal court to follow Restatement 2d of Torts § 402(a) in expanding accountability of manufacturers on theory of strict products liability); Green, *supra* note 22, at 171 (discussing effect of *Borel* judgment on subsequent asbestos personal injury cases); Hensler & Peterson, *supra* note 22, at 1003-05 (discussing impact of *Borel* on asbestos litigation).

²⁴ See Shultz, *supra* note 17, at 561 (stating that in eighteen years following *Borel*, thousands of cases flooded federal and state judicial systems); see also Brennan, *supra* note 23, at 204 n.45 (warning that rejection of collateral estoppel in asbestos cases may increase amount of litigation); Susan Stevens Ford, *Who Will Compensate the Victims of Asbestos-Related Diseases?*

By 1991 there were as many as 100,000 individual asbestos personal injury suits pending in federal and state courts across the country.²⁵ As a result, several asbestos-containing product manufacturers have been forced into bankruptcy in an effort to cap liability.²⁶ Additionally, there is now a real possibility that those plaintiff's litigating first will strip manufacturers of all remaining assets, leaving nothing to compensate future claimants who have not yet developed an asbestos-related illness.²⁷

II. THE CURRENT SYSTEM OF CASE MANAGEMENT

Under the current civil justice system, plaintiffs can expect long delays in the disposition of their cases.²⁸ Federal Judicial Center

Manville's Chapter 11 Fuels the Fire, 14 ENVTL. L. 465, 469 (1984) (providing how increase in litigation has made asbestos cases most common type of products liability lawsuit); James T. O'Reilly, *Risks of Assumptions: Impacts of Regulatory Label Warnings Upon Industrial Products Liability*, 37 CATH. U. L. REV. 85, 86 (1987) (discussing how industrial products liability will continue to increase).

²⁵ See Order to Show Cause, Judicial Panel on Multidistrict Litigation, No. 875 (1991); Shultz, *supra* note 17, at 561 (indicating that some estimates put number of suits pending in court system in neighborhood of 100,000); see also Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 175 (1998) (observing how *Borel* led to increasing number of asbestos cases); Green, *supra* note 22, at 667 (noting that 50,000 is conservative estimate of number of pending asbestos suits).

²⁶ See H.R. 1283 at § 2 (1999) (stating that Congress has found that asbestos litigation has led to bankruptcy of more than 15 companies who have manufactured asbestos-containing products); see also *In re UNR Indus., Inc.*, 45 B.R. 322 (Bankr. N.D. Ill. 1984) (interpreting Bankruptcy Amendments and Federal Judgeship Act of 1984 to require asbestos trial in district court); *In re Johns-Manville Corp.*, 36 B.R. 743 (Bankr. S.D.N.Y. 1984) (reporting bankruptcy filing and cognizable claims in bankruptcy); *In re Amatec*, 37 B.R. 613 (Bankr. E.D. Pa. 1983) (concluding asbestos claimants are not creditors); Valle Simms Dutcher, *Comment: The Asbestos Dragon: The Ramifications of Creative Judicial Management of Asbestos Cases*, 10 PACE ENVTL. L. REV. 955, 956-57 (1993) (discussing results of bankruptcy filings on competitiveness of American business); see, e.g., *In re Forty-eight Insulations, Inc.*, 133 B.R. 973 (Bankr. N.D. Ill. 1991) (discussing bankruptcy filing of Forty-Eight Insulation, Inc.).

²⁷ See H.R. 1283 at § 2 (finding that current litigation system awards massive amounts to few claimants while jeopardizing ability of future claimants to obtain compensation); see also *Jackson v. Johns-Manville Corp.*, 750 F.2d 1314, 1329 (5th Cir. 1985) (Clark, C.J., dissenting) (voicing his concern that those who litigate first will exhaust all assets available to compensate injured parties, leaving nothing to compensate future claimants). See generally Dutcher, *supra* note 26, at 958 (stating that courts must be conscious of interests of future claimants or current damage awards and costs will exhaust corporate assets of defendant companies); Arthur R. Miller & Price Ainsworth, *Symposium on Problems in Disposition of Mass Related Cases and Proposals for Change: Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419, 425 (1991) (recognizing danger of depleting assets available to compensate future claimants).

²⁸ See Judicial Conference Ad Hoc Committee on Asbestos Litigation, Report of the Ad Hoc Committee (1991) (hereinafter *Ad Hoc Committee*) (stating that asbestos cases take an inordinately long time to reach disposition); see also H.R. 1283 at § 2 (finding that "volume and complexity of asbestos cases have resulted in the violation of basic tenet of American justice: speedy and inexpensive resolution of cases"). See generally Dutcher, *supra* note 26, at 957 (discussing customary delays associated with asbestos suits); Hensler & Peterson, *supra* note 22, at 963 (discussing problems facing asbestos claimants in current judicial system).

statistics demonstrate that as of 1989, the average asbestos personal injury suit filed in federal court does not reach trial for nearly three years.²⁹ For many claimants, that is time they do not have.³⁰

Similarly, the high costs of litigating asbestos suits drastically reduce the eventual recovery received by the claimant.³¹ One study demonstrated that for each dollar spent in connection with asbestos litigation, claimants received approximately thirty-nine cents.³² In addition to the pecuniary costs, valuable judicial resources are wasted relitigating many of the same issues associated with asbestos suits.³³ Courts can expect to hear the same evidence presented on the issues of causation, liability and damages for each plaintiff.³⁴

In an effort to preserve valuable time and judicial resources, courts facing such a mass tort problem have employed extra-judicial methods of case management.³⁵ The Federal Rules of Civil Procedure provide several such methods for aggregating cases, including consolidation³⁶ and class action.³⁷ Application of many of

²⁹ See Federal Judicial Center, Asbestos Conference (June 25, 1990).

³⁰ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 759 (Bankr. E. & S.D.N.Y. 1991) (noting that many asbestos claimants die awaiting trial); Dutcher, *supra* note 26, at 957 (1993) (stating that many plaintiffs die of asbestos-related disease before reaching trial); see also Schultz, *supra* note 17, at 562 (indicating that many asbestos victims will die before receiving any compensation).

³¹ See Ad Hoc Committee, *supra* note 28 (recognizing that asbestos litigation has proven to be extraordinarily costly); H.R. 1283 at § 2 (finding that attorney's fees and litigation costs leave less than 50 percent of total cost of asbestos litigation to compensate claimants); see also Schultz, *supra* note 17, at 562 (discussing high cost of asbestos litigation). See generally JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION, COMPENSATION AND EXPENSES 91 (1984) (discussing high costs of asbestos litigation).

³² See KAKALIK ET AL., *supra* note 31, at 91 (noting compensation for asbestos victims tends to be very limited); see also *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 790 (indicating that claimants receive about thirty-nine cents of every dollar spent on litigation); Schultz, *supra* note 17, at 562 (asserting that claimants receive approximately thirty-nine cents out of every litigation dollar).

³³ See Ad Hoc Committee, *supra* note 28 (noting that many of issues litigated in asbestos suits have previously been litigated). See generally Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987) (discussing potential waste of judicial resources from duplicative litigation).

³⁴ See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 651 (E.D. Tex. 1990) (stating that courts hear much of same evidence replicated from case to case); Roger C. Cramton, *Symposium: Mass Torts: Serving Up Just Desserts: Individualized Justice, Mass Torts, and "Settlement Class Actions"*, 80 CORNELL L. REV. 811, 817 (1995) (discussing problems of retrying same evidence in separate asbestos trials).

³⁵ See *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. at 738 (stating that use of mediation in mass tort litigation was essential to proper function of judicial system); *Jenkins v. Raymark Industries*, 782 F.2d 468, 471 (5th Cir. 1986) (appointing special settlement master to gather information from all parties to facilitate pre-trial discovery); see also Cramton, *supra* note 34, at 816 (discussing available extra-judicial management techniques for mass tort claim resolution). See generally Schultz, *supra* note 17 (discussing currently available extra-judicial management techniques for mass tort claim resolution).

³⁶ See FED. R. CIV. P. 42 (allowing consolidation of cases pending in same court which

these drastic measures, however, have forced judges to take on a more active role in the case disposition process.³⁸

A. Federal Case Consolidation

The Federal Rules of Civil Procedure provide for the consolidation of cases filed in the federal court system in select situations in order to preserve judicial resources.³⁹ Under Rule 42(a) of the Federal Rules of Civil Procedure, a federal court may consolidate all cases pending in that same district presenting common questions of law or fact.⁴⁰ Consolidation under this rule allows courts to expedite the litigation process by collectively trying the common issues in bifurcated or trifurcated trials before a few juries rather than on an individual basis.⁴¹

Unfortunately, Rule 42(a) consolidation is limited to those cases pending in the same federal district.⁴² In addition, consolidation of

present same issue of law or fact).

³⁷ See FED. R. CIV. P. 23 (making special provisions for filing single suit on behalf of multiple claimants where joinder of such parties would be impracticable).

³⁸ See *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. at 653 (aggregating hundreds of asbestos claims for adjudication in single three-phase trial); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1396, 1450 (E.D.N.Y. 1985) (utilizing special settlement master to bring parties together in settlement negotiations). See generally Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

³⁹ See *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."); *Newfound Management Corp. v. Lewis*, 131 F.3d 108, 116 (1997) (noting that Supreme Court's holding in *Johnson* "remains the 'authoritative' statement on the law of consolidation"); see also Richard A. Chesley & Kathleen Woods Kolodgy, *Mass Exposure Torts: An Efficient Solution to a Complex Problem*, 54 U. CIN. L. REV. 467, 503 (1985) (discussing broad discretion of federal courts to consolidate multiple actions pending in single federal district under Rule 42).

⁴⁰ FED. R. CIV. P. 42(a) states:

When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Id.

⁴¹ See Amy Gibson, *Cimino v. Raymark Industries: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 BAYLOR L. REV. 463, 469-71 (1994) (examining Judge Parker's creative use of aggregation of suits to resolve mass tort claims); Francis E. McGovern, *supra* note 5, at 662 (discussing Judge Parker's creative use of aggregation of claims to resolve mass asbestos litigation in Eastern District of Texas). See generally Davis, *supra* note 25, at 180 (citing *Cimino v. Raymark* as landmark case due to Judge Parker's efforts); Linda S. Mullenix, *Article: Beyond Consolidation: Post Aggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 483 (1991) (analyzing consolidated handling of mass tort litigation by Judge Parker).

⁴² See FED. R. CIV. P. 42(a); see also *Popkin v. Eastern Airlines, Inc.*, 253 F. Supp. 244, 249 (E.D. Pa. 1966) (noting that Rule 42 does not permit consolidation of claims pending in other federal districts); *Anschell v. Sockheim*, 145 F. Supp. 447, 451 (D.N.J. 1956) (stating that federal

cases under this rule is further limited to only common issues of law and fact.⁴³ Thus, even after such consolidation, an individual trial must still be held for each claimant on all unique issues.

Federal Courts may also seek consolidation of claims pending in the federal system through The Judicial Panel on Multidistrict Litigation.⁴⁴ Under this rule, all cases within the federal court system presenting common issues may be transferred to a single court for pretrial proceedings.⁴⁵ Such a transfer allows the recipient court to concentrate its efforts on these consolidated matters.⁴⁶ The Judicial Panel has made efforts to resolve the growing asbestos crisis through §1407 without much success.⁴⁷

Use of this device, however, is limited only to those cases pending in the federal court system⁴⁸ which share common issues of fact or

court jurisdiction in Rule 42 consolidations apply only to those cases pending in forum court's judicial district).

⁴³ See FED. R. CIV. P. 42; see also *St. Paul Fire & Marine Ins. Co. v. King*, 45 F.R.D. 519, 520 (W.D. Okla. 1968) (requiring presence of common questions of law or fact for consolidation under Rule 42); *Oliver v. Humble Oil & Refining Co.*, 225 F. Supp. 536, 539 (E.D. La. 1963) (stating that Rule 42 consolidation possible only where common questions of law or fact present).

⁴⁴ See 28 U.S.C. § 1407(a). The Judicial Panel on Multidistrict Litigation is a judicial body comprised of seven district and circuit judges appointed by the Chief Justice of the Supreme Court of the United States. *Id.* at § 1407(d).

⁴⁵ 28 U.S.C. § 1407(a) states in part:

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.

Id. See also *In re Photocopy Paper*, 305 F. Supp. 60, 61 (J.P.M.L. 1969) (stating that transfer and consolidation under § 1407 would not be proper unless common issues of fact existed among suits pending in different federal districts). See generally D. HERR, MULTIDISTRICT LITIGATION 7-17 (1986) (discussing utility of multidistrict consolidation).

⁴⁶ See, e.g., *In re Silicone Gel Breast Implant Prod. Liab. Litig.*, No. 926, 1993 WL 199129, at 1 (J.P.M.L. May 4, 1993) (transferring all pending federal breast implant cases to single court pursuant to § 1407); *In re Asbestos Prods. Liab. Litig.*, No. VI, 771 F. Supp. 415 (J.P.M.L. 1991) (ordering transfer of 26,639 cases from 87 federal districts to Judge Weiner in Eastern District of Pennsylvania for pre-trial proceedings pursuant to § 1407).

⁴⁷ See *In re Asbestos Prods. Liab. Litig.*, No. VI, 771 F. Supp. at 424 (transferring all pending federal court asbestos cases that were not yet on trial to Eastern District of Pennsylvania for consolidated pretrial proceedings); see also Dutcher, *supra* note 26, at 972 (discussing efforts of Judicial Panel on Multidistrict Litigation to resolve asbestos crisis); Blake M. Rhodes, *The Judicial Panel on Multidistrict Litigation: Time for Rethinking*, 140 U. PA. L. REV. 711 (1991) (noting efforts to resolve asbestos cases by judicial panel).

⁴⁸ See 28 U.S.C. § 1407(a); see also H.R. Rep. No. 1130, 90th Cong., 2nd Sess. 1 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1900 (noting that transfer under § 1407 is appropriate only where such transfer allows for economy and efficiency in administration of justice); Schultz, *supra* note 17, at 591-93 (noting that transfer under § 1407 would have no effect on thousands of asbestos suits pending in state courts); Weinstein & Hershenov, *supra* note 1, at 296 (discussing limitations on use of transfer under § 1407). See generally Chesley & Kolodgy, *supra* note 39, at 509 (discussing limitations on multi-district litigation consolidation pursuant

law.⁴⁹ Transfer under this rule is further limited because it may be used for purposes of pretrial administration only,⁵⁰ requiring that all cases be remanded to the district court of their original filing once the pretrial procedures are complete.⁵¹ Finally, it should be noted that the most important function of pretrial transfer pursuant to §1407 is for discovery of common issues of liability which, in the case of asbestos, are no longer in contention.⁵²

B. Rule 23 Class Action

Currently, the most promising method of mass claim disposition available in the federal court system is that of the class action suit established in Federal Rule of Civil Procedure 23.⁵³ Under this provision, multiple claimants may file a single consolidated suit in federal court rather than litigating each case separately.⁵⁴ To receive court certification under Rule 23, however, the class must meet various requirements with respect to the types of issues,

to § 1407).

⁴⁹ See *In re Grand Funk Railroad Trademark Litigation*, 371 F. Supp. 1084, 1085 (J.P.M.L. 1974) (stating that transfer and consolidation pursuant to § 1407 would be denied where actions contained only limited common questions and where discovery on common issues was nearly complete); *In re Pension Fund Class Action Litigation*, 360 F. Supp. 1400, 1401 (J.P.M.L. 1973) (denying consolidation under § 1407 where petitioners failed to demonstrate existence of common issues of law or fact among various suits).

⁵⁰ See 28 U.S.C. § 1407(a); see also Chesley & Kolodgy, *supra* note 39, at 506 (stating that § 1407 consolidation may only be used for pretrial purposes, limiting its utility for purposes of mass tort claims); Tracy Schroth, *Plan Would Consolidate Federal Asbestos Cases: Panel Seeks to Streamline Process*, N.J.L.J., June 6, 1991, at 5 (stating that transfer of asbestos cases by multidistrict litigation panel would be handled by single court for pretrial purposes and then remanded to their courts of origin for trial); Schultz, *supra* note 17, at 591-93 (noting limitation of panel authority because asbestos cases filed in state court).

⁵¹ See Sherrill P. Hondorf, *A Mandate for the Procedural Management of Mass Exposure Litigation*, 16 N. KY. L. REV. 541, 557 (1989) (arguing that purpose of consolidation is defeated when cases must be remanded after conclusion of pretrial proceedings); Rhodes, *supra* note 47, at 714-15 (emphasizing that transfer is only for pretrial purposes); see also Sander Mazer Moss, *Response to Judicial Federalism: A Proposal to Amend the Multidistrict Litigation Statute from a State Judge's Perspective*, 73 TEX. L. REV. 1573, 1574 (1995) (stating that for purposes of discovery, consolidating tort claims on both state and federal level helps to expedite judicial process).

⁵² See Gordon Hunter, *Asbestos Supercase Is Born; Multidistrict Move One of Several*, TEX. LAW., Feb. 25, 1991 at 1 (stating that major common issues of liability and general causation have been established through repeated litigation); see also Berman, *supra* note 22, at 93 (stating that asbestos makers may be held liable for harms from their products even if they had no knowledge); Schultz, *supra* note 17, at 591-93.

⁵³ See FED. R. CIV. P. 23; Charles S. McGowan, Jr. and Calvin C. Fayard, Jr., *The Louisiana Class Action*, 58 LA. L. REV. 953, 954 (1998) (discussing importance of Rule 23 for class actions). But see Jean F. Rydstrom, *Propriety Under Rule 23 of Federal Rules of Civil Procedure of Class Action for Injuries in Airplane Crash*, 28 A.L.R. FED. 719 (discussing inappropriateness of "mass accident" for consolidation).

⁵⁴ See FED. R. CIV. P. 23(a).

predominance of those issues, and adequacy of class representation.⁵⁵

Certification under Rule 23 requires that the class be so numerous that the participation of all of the parties would be impracticable.⁵⁶ This requirement would not be difficult to satisfy in the case of an asbestos exposure class, given the sheer number of persons exposed across the country.⁵⁷ This rule further mandates those common questions of law or fact be pervasive throughout the class.⁵⁸ Asbestos claimants generally allege exposure to products made by the same manufacturers and they also assert that asbestos in general has the capacity to cause various physical injuries.⁵⁹ Plaintiffs often allege that the warnings accompanying asbestos-containing products are inadequate to allow them to make an educated decision regarding use of the products.⁶⁰ It seems likely, therefore, that a class of asbestos claimants would easily satisfy this element.

Certification for class action under this rule also requires that the claims and defenses of the class representatives be typical of the class as a whole.⁶¹ Rule 23 demands that the claims being presented and litigated by the representatives are adequately developed,

⁵⁵ FED. R. CIV. P. 23(a) provides that a class action may be brought if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. *Id.*

⁵⁶ FED. R. CIV. P. 23(a)(1).

⁵⁷ See *Ahearn v. Fibreboard*, 162 F.R.D. 505, 523-24 (E.D. Tex. 1995) (stating that with class membership numbering in hundreds of thousands, joinder of claims would be impracticable); *Jenkins v. Raymark*, 782 F.2d 468, 468 (5th Cir. 1986) (noting that millions of people had been exposed to asbestos at work); Marc T. Kramer, 13 OHIO ST. J. ON DISP. RESOL. 749, 749 (1998) (stating that asbestos litigation could include millions of plaintiffs); *Schultz*, *supra* note 17, at 561 (stating that asbestos cases pending on federal dockets may be as high as 100,000).

⁵⁸ See FED. R. CIV. P. 23(a)(2); *Jenkins v. Raymark*, 782 F.2d at 472 (stating that rule requires that resolution affect substantial number of class members); Ryan Kathleen Roth, *Mass Tort Malignancy: In the Search for a Cure, Courts Should Continue to Certify Mandatory Settlement Only Class Actions*, 79 B.U. L. REV. 577, 587 (1999) (stating that commonality requirement focuses on class as whole).

⁵⁹ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996) (stating that whether asbestos fibers have capacity to cause physical injury is common question among claimants); *Schultz*, *supra* note 17, at 561 (discussing increasing number of medical disorders caused by asbestos exposure). *But see* Roth, *supra* note 58, at 592 (stating that claimants injuries often range in severity).

⁶⁰ See *Georgine*, 83 F.3d at 626 (recognizing other common issues such as defendant's knowledge of hazard posed by asbestos, adequacy of testing and warnings).

⁶¹ See FED. R. CIV. P. 23(a)(3); *Jenkins v. Raymark*, 782 F.2d at 471-72 (stating that if plaintiffs have typical claims then attorneys will adequately represent them and that typicality requirement focuses less on relative strengths of named and unnamed cases and more on similarity of characteristics); Roth, *supra* note 58, at 588-89 (discussing "typicality requirement").

presenting essentially the same claims that would have been presented and litigated by the individual member of the class had they filed individually.⁶² This requirement is imposed to protect the interests of the individual claimants who have waived their right to present their case on an individual basis.⁶³

Unfortunately, the claims of asbestos class members vary widely since plaintiffs were usually exposed to different products, over different periods of time, and in different ways.⁶⁴ Additionally, individual class members develop a broad spectrum of asbestos-related injuries ranging from pleural disease to mesothelioma.⁶⁵ Thus, it seems unlikely that a group of class representative plaintiffs could assert all of the claims that would have been presented by the individual class members.⁶⁶

⁶² See FED. R. CIV. P. 23(a)(3); *Jenkins v. Raymark*, 782 F.2d at 472 (stating that adequacy requirement looks at both class representatives and their counsel); *Ahearn*, 162 F.R.D. at 524 (discussing qualifications of counsel and representativeness of plaintiffs).

⁶³ See *Amchem v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (stating that adequacy-of-representation requirement of Rule 23(a) serves to verify that interests of class members are fairly and adequately protected in their absence); *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58 n.13 (1982) (explaining that adequacy-of-representation requirement determines "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence"); *East Tex. Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (recognizing that class representative must "possess the same interest and suffer the same injury" as the class members); *Chesley & Kolodgy*, *supra* note 39, at 477 (stating that this requires that plaintiffs not be antagonistic at outset of litigation); *Roth*, *supra* note 58, at 596-97, (stating that adequacy of representation is most important requirement because it justifies substituting individual plaintiffs).

⁶⁴ See *Brenner*, *supra* note 2, at 781 (stating that factual distinctions as to causation, damages and defenses make it difficult to satisfy Rule 23 "typicality" requirement for class certification); Deborah Deistch-Perez, *Mechanical and Constitutional Problems in the Certification of Mandatory Multistate Mass Tort Class Actions Under Rule 23*, 49 BROOK. L. REV. 517, 527-28 (1983) (stating that accidents occur in numerous ways).

⁶⁵ See *Brenner*, *supra* note 2, at 784-87 (indicating that Rule 23 requirement of "adequacy of representation" may not be met where plaintiff's present different stages and types of injuries due to progressive nature of asbestos related diseases); *Cramton*, *supra* note 34, at 816 (recognizing that exposure histories of asbestos claimants may be distinctly different); *Roth*, *supra* note 58, at 492 (stating that severity of injuries suffered by claimants vary across broad range).

⁶⁶ See *Amchem*, 521 U.S. at 609-10 (stating that asbestos claimants that have been exposed to different products, in different ways and over different periods of time with resulting variations manifests disease); see also G. Donald Puckett, *Peering Into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1288 (1999) (this requirement is intended to ensure cohesion among class so that representatives will represent class members' interests as well as their own); *Roth*, *supra* note 58, at 596 (considered procedural hurdle for many class representation cases, requirements of Rule 23(a)(4) ensure that traditional notions of due process are fulfilled and substituting individual participation in judicial process is justified); *Burt M. Rublin, Class Action Case, Denise L. Rowland v. American General Consumer Discount Company*, 1113 PLI/CORP. 31, 31 (1999) (noting typicality requirement overlaps with requirement that interests of class be adequately protected).

III. EFFORTS AT COLLECTIVE RESOLUTION OF THE ASBESTOS PROBLEM

In 1990, after examining the asbestos situation, a United States Judicial Conference Ad Hoc Committee on Asbestos Litigation recommended that the Judicial Panel on Multidistrict Litigation transfer and consolidate all pending federal asbestos suits to a single district for pretrial proceedings.⁶⁷ The MDL panel transferred all pending federal cases to the United States District Court for the Eastern District of Pennsylvania.⁶⁸ After the consolidation, attorneys reached a settlement agreement disposing of all pending and future claims against the defendant companies.⁶⁹ To effectuate the settlement, all of the transferee claimants jointly filed a class action in the name of Robert Georgine as class representative pursuant to Rule 23.⁷⁰

District Judge Weiner certified the class for settlement purposes, finding that the requirements for class certification under Rule 23 had been satisfied.⁷¹ The Third Circuit Court of Appeals reversed this holding, stating that the class could neither satisfy Rule 23(a) requirements of typicality and adequacy of representation, nor Rule 23(b) requirements of predominance and superiority.⁷² Circuit Judge Becker reasoned that the individual claims of the class members were too unique to satisfy class certification requirements.⁷³

⁶⁷ See *In re Asbestos Prods. Liab. Litig.*, No. VI, 771 F. Supp. 415, 418-19 (J.P.M.L. 1991) (discussing report from Judicial Conference Ad Hoc Committee on Asbestos recommending consolidation of all federal asbestos suits). See generally Davis, *supra* note 25, at 163 n.28 (discussing Judicial Conference Ad Hoc committee and recommendation regarding consolidation of federal asbestos suits); W. O'Leary, *Mass Tort Class Actions: Will Amchem Spawn Creative Solutions?*, 65 DEF. COUNS. J. 469, 469 (1998).

⁶⁸ See *In re Asbestos Prod. Liab. Litig.*, No. VI, 771 F. Supp. at 419 (ordering transfer of all pending federal asbestos suits to Eastern District of Pennsylvania for pretrial proceedings); see also O'Leary, *supra* note 67, at 469.

⁶⁹ See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 620-21 (3d Cir. 1996). The *Georgine* class settlement provided for settlement of all present and future claims for personal injury or wrongful death against twenty separate defendant companies known collectively as the Center for Claims Resolution. *Id.*

⁷⁰ See *Carlough v. Amchem Products, Inc.*, 834 F. Supp. 1437 (E.D. Pa. 1993) (granting provisional certification to settlement class).

⁷¹ See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 257 (E.D. Pa. 1994) (granting final certification of *Georgine* settlement class). See generally Michael P. Malakoff and Erin M. Brady, *Taming the Uncommon Issue: What Role Should Subclasses Play in Rule 23(B)(3) Certifications?*, 772 PLI/COMM 329, 333 (1998) (summarizing procedural history).

⁷² See *Georgine*, 83 F.3d at 634 (reversing certification of settlement class); see also Roth, *supra* note 58, at 585.

⁷³ See *Georgine*, 83 F.3d at 627. In *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the U.S. Supreme Court affirmed Judge Becker's order decertifying the *Georgine* class on the grounds that it failed to meet the Rule 23 requirements of predominance and adequacy of representation. The *Amchem* Court further noted that such a class certification would also present questions regarding the adequacy of notice to future claimants. *Id.* at 629.

A similar class was certified for settlement purposes in the United States District Court for the Eastern District of Texas in *Ahearn v. Fibreboard*.⁷⁴ There, the District Court certified a class for mandatory global settlement under rule 23(b) on the grounds that the settlement created a limited fund and that a mandatory class action was appropriate to protect the interests of future claimants.⁷⁵ The Fifth Circuit upheld the settlement class certification on the limited fund grounds both on initial appeal⁷⁶ and on remand.⁷⁷

In *Ortiz v. Fibreboard*,⁷⁸ the United States Supreme Court struck down the Fifth Circuit's certification of the Ahearn class on the grounds that it failed to meet the "limited fund" requirement of Rule 23(b).⁷⁹ The court reasoned that the limited fund in question was limited only by the settlement agreement itself, and not by some independent source or circumstance which would otherwise require the use of such a mandatory class action.⁸⁰ In reaching its

⁷⁴ 162 F.R.D. 505 (E.D. Tex. 1995).

⁷⁵ See *Ahearn*, 162 F.R.D. at 530 (stating that class satisfied all requirements of Rule 23(b) and should be certified for settlement purposes); see also Jeremy Gaston, *Standing on its Head: The Problem of Future Claimants in Mass Tort Class Actions*, 77 TEX. L. REV. 215, 216 n.9 (1998) (discussing certification of *Ahearn* settlement class on "limited fund" basis); Todd W. Latz, *Who Can Tell the Futures? Protecting Settlement Class Action Members Without Notice*, 85 VA. L. REV. 531, 552-53 (1999) (discussing "limited fund" certification granted *Ahearn* settlement class in District Court); Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 442 (1999) (noting that in *Ahearn* judge appointed guardian *ad litem* to insure there would be no conflict between future claimants and claimants with cases pending).

⁷⁶ See *In re Asbestos Litigation*, 90 F.3d 963, 974, 991-93 (1996) (affirming certification of *Ahearn* class on initial appeal from District Court); see also Donald C. Massey, Louis C. LaCour, Jr., & Valerie M. Sercovich, *Curtailing the Tidal Surge: Current Reforms in Louisiana Class Action Law*, 44 LOY. L. REV. 7 n.99 (1998); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 556 (1997) (noting that *Ahearn* settlement class was certified by 5th Circuit Court of Appeals because guardian *ad litem* was appointed by District Court to protect interests of future claimants).

⁷⁷ See 521 U.S. 1114 (1997) (remanding original petition for certiorari to Fifth Circuit Court of Appeals for reconsideration of class certification in light of *Windsor* decision); *Flanagan v. Ahearn*, 134 F.3d 668 (1998) (reaffirming certification of *Ahearn* class following remand from U.S. Supreme Court).

⁷⁸ 527 U.S. 815 (1999); see also Marc A. Yaggi, *The U.S. Supreme Court's 1998-1999 Term*, 29 ENVTL. L. REP. 10610, 10615 (1999).

⁷⁹ See *Ortiz*, 527 U.S. 815, 863 (stating that record demonstrated that certain exclusions from class and treatment of specific assets were at odds with concept of limited fund treatment under 23(b) as well as structural protections of Rule 23(a)).

⁸⁰ See FED. R. CIV. P. 23(e) (stating that fairness of settlement does not dispense with requirements of subdivisions (a)(b)); *Ortiz*, 527 U.S. 815, 863 (stating that such limited fund must be shown to be limited independently of agreement of parties to action); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1995) (stating that settlements creating limited funds where company facing liability provides only *de minimus* contribution may create incentives for company to undermine protections of creditors built into Bankruptcy Code). See generally H. NEWBERG & A. CONTE, *CLASS ACTIONS* 4.01, 4-6 (3rd ed. 1992) (explaining use of Rule 23(b)(1)(B) in mandatory limited fund class actions); William W. Schwarzer, *Structuring Multicclaim Litigation: Should Rule 23 Be Revised*, 94 MICH. L. REV. 1250,

conclusion, the Court further noted that such a fund must still meet the stringent requirements of Rule 23.⁸¹

After examining the settlement class actions proposed under Rule 23 in *Georgine* and *Ahearn*, it is clear that there are several problems with using Rule 23 to resolve the ongoing asbestos crisis. The Supreme Court stated in both *Amchem Products, Inc. v. Windsor*⁸² and *Ortiz* that the settlement classes failed to satisfy the threshold requirements of predominance and adequacy of representation.⁸³ Additionally, the Court in *Ortiz* determined that Rule 23(b) requirements of "limited fund" could not be met in a case of a global settlement such as the one proposed in *Ahearn*.⁸⁴ Thus, it seems highly unlikely that an asbestos class could ever satisfy the burdensome requirements of Rule 23.

IV. A SOLUTION TO THE PROBLEM

Congress has finally taken steps to resolve the asbestos litigation crisis by proposing The Fairness in Asbestos Compensation Act.⁸⁵ This legislation strikes a balance between the public interest in exacting full compensation from the manufacturers of asbestos products⁸⁶ and the social necessity of preserving something for

1257 (1996) (discussing factors to consider in use of Rule 23 in mass-tort litigations).

⁸¹ See *Ortiz*, 527 U.S. at 831-32 (noting that in certifying *Ahearn* class, Fifth Circuit failed to give due attention to requirements of 23(a) in light of *Windsor*); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622-28 (1997) (holding that *Georgine* class cannot satisfy either predominance or adequacy or representation requirements of Rule 23); *Dickinson v. Burnham*, 197 F.2d 973, 979-80 (2d Cir. 1952) (noting that in securities class action definiteness of fund, as well as Rule 23(a) requirements, are important for court to consider in certifying class).

⁸² 521 U.S. 591 (1997).

⁸³ See *Windsor*, 521 U.S. at 622, 628 (holding that *Georgine* class could not satisfy either predominance or adequacy of representation requirements of Rule 23); *Ortiz*, 527 U.S. at 831-08 (declaring that on remand, Fifth Circuit failed to adhere to ruling in *Amchem* regarding Rule 23(a) requirements).

⁸⁴ See *Ortiz*, 527 U.S. at 844-45 (stating that it is clear that drafters of Rule 23(b) did not contemplate use of limited fund mandatory class action to aggregate unliquidated tort claims on limited fund rationale); Monaghan, *Antitrust Injunctions and Preclusions Against Absent Non-Resident Class Members*, 98 COLUM. L. REV. 1148, 1164 (1998) (stating that draftsmen did not intend emerging expansive interpretations of Rule 23 (b)(1)(B), which allow Rule to be functional equivalent to bankruptcy by embracing "funds" created by litigation itself); see also Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 877 (1995) (considering effects of Rule 23 on state tort law with respect to *Erie's* doctrinal concerns); William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995) (noting that original concept of limited fund class does not fit situation where large number of claims might eventually result in judgements that in aggregate could exceed assets available to satisfy them).

⁸⁵ H.R. 1283, 106th Cong. (1999).

⁸⁶ See Weinstein & Hershenov, *supra* note 1, at 323 (stating that role of courts "has been to

future claimants who have not yet developed any illness related to asbestos.⁸⁷ It is virtually conceded that unless Congress takes some action to protect the interests of future claimants, shortly no viable, non-bankrupt company will remain to compensate those who are not yet sick.⁸⁸ Where necessary in the past Congress has stepped in to create an equitable solution in situations involving mass tort liability, often enacting legislation balancing the rights of individuals against the greater public good.⁸⁹

As a threshold matter, this statute would modify the rights of individual asbestos claimants by removing all asbestos-related personal injury claims currently pending in every court in America from the traditional court system⁹⁰ and barring any future filings without prior certification from the Corporation.⁹¹ This represents a significant inroad into the fundamental principles of federalism where states traditionally have maintained their individual sovereign police powers to regulate tort law.⁹² It is very likely,

protect the injured who come before them against those who have caused...unjustified harm").

⁸⁷ See H.R. 1283 at § 2 (finding that current litigation system awards massive amounts to few claimants while threatening ability of future claimants to obtain compensation); *Jackson v. Johns-Manville Corp.*, 750 F.2d 1314, 1329 (5th Cir. 1985) (Clark, C.J., dissenting) (voicing his concern that those who litigate first will exhaust all assets available to compensate injured parties, leaving nothing to compensate future claimants). See generally Dutcher, *supra* note 26, at 958 (stating that courts must be conscious of interests of future claimants or current damage awards and costs will exhaust corporate assets of defendant companies); Miller & Ainsworth, *supra* note 27, at 425 (recognizing danger of depleting assets available to compensate future claimants).

⁸⁸ See H.R. 1283 at § 2(2) (finding that asbestos litigation has already forced great majority of asbestos industry into bankruptcy); see, e.g., *Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 710 (Bankr. E. & S.D.N.Y. 1991) (resolving bankruptcy petition of Eagle-Picher Industries, Inc.); *In re Forty-Eight Insulations, Inc.*, 133 B.R. 973, 973 (Bankr. N.D. Ill. 1991) (filing of bankruptcy petition by Forty-Eight Insulations, Inc.); *In re UNR Indus., Inc.*, 45 B.R. 322, 322 (Bankr. N.D. Ill. 1984) (filing of bankruptcy petition by UNR Industries, Inc.); *In re Amatex*, 37 B.R. 613, 613 (Bankr. E.D. Pa. 1983) (filing of bankruptcy petition by Amatex).

⁸⁹ See, e.g., Black Lung Benefits Act § 922, 30 U.S.C. § 901 (1969) (establishing statutory compensation scheme for victims of coal dust exposure); National Childhood Vaccine Injury Act §§ 300aa-10, 42 U.S.C. §§ 300aa-1 (1986) (establishing national compensation system for children injured through vaccination).

⁹⁰ See H.R. 1283 at §§ 701-02. This provision would apply to "any civil action asserting an asbestos claim that has not resulted in a final, non-appealable judgement" as of the date of enactment. *Id.* at § 701.

⁹¹ See H.R. 1283 § 401. This provision would bar filing of any asbestos personal injury suit in any court without obtaining a certificate of medical eligibility from the Corporation pursuant to § 205. *Id.* at § 401.

⁹² See *Finding Solutions to the Asbestos Litigation Problem*, 1999: Hearing on S. 758 Before the Subcomm. On Administrative Oversight and the Courts of the Senate Comm. On the Judiciary, 106th Cong. (Oct. 6, 1999) (statement of Richard Middleton, Jr., President, Assoc. of Trial Lawyers of America) (arguing that FACA provisions which modify existing state tort law and eliminate claimants' rights to seek compensation through traditional tort system create serious Tenth Amendment problems). But see *The Fairness in Asbestos Compensation Act*, 1999: Hearings on S.

however, that Congress does maintain the constitutional authority to regulate the nationwide disposition of asbestos suits under Article I, Section 8 of the Constitution which grants Congress the broad power to regulate interstate commerce.⁹³

The medical eligibility provisions further reduce the options available to claimants by eliminating a claimant's legal right to file suit unless physically impaired or suffering an accepted malignancy.⁹⁴ By contrast, many individuals who would not meet the medical certification criteria established by FACA would be eligible for compensation under applicable state tort law.⁹⁵ Although this may seem like a great sacrifice, the class settlement agreement proposed and accepted by the *Georgine* plaintiff class contained a similar disease categorization scheme.⁹⁶ Finally, those claimants who do meet the eligibility criteria for filing a claim with the Corporation will not be able to recover punitive damages,⁹⁷ damages for emotional distress⁹⁸ or for increased risk of cancer or other asbestos related disease.⁹⁹ This too may seem like quite a sacrifice for claimants, however, the class settlement agreement accepted by the plaintiff class in *Ortiz* contained a similar provision barring punitive damages and prejudgment interest while also placing a cap on each claimant's total possible recovery.¹⁰⁰

Under most state tort laws, in order to preserve a cause of action,

758 *Before the Subcomm. On Administrative Oversight and the Courts of the Senate Comm. On the Judiciary*, 106th Cong. (Oct. 5, 1999) (statement of Paul R. Verkuil, Dean and Professor of Law, Benjamin N. Cardozo Law School) (arguing that FACA's modifications of state law are "consistent with principles of federalism enshrined in the Tenth Amendment and with the substantive due process rights of claimants").

⁹³ See *U.S. v. Darby*, 312 U.S. 100, 119 (1941) (stating that Congress has broad discretion to regulate those activities which "have a substantial effect on commerce"); *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (noting that Congress' power to regulate interstate commerce is plenary with freedom to enact any legislation which is appropriate to protect and advance it; see also Verkuil, *supra* note 92, at 1 (arguing that regulation of asbestos litigation through enactment of FACA is within Congress' commerce clause powers).

⁹⁴ See H.R. 1283 at §§ 201-205.

⁹⁵ See Middleton, *supra* note 92, (stating that adoption of medical criteria established by FACA would do great injustice to many claimants who have been injured but do not meet heightened medical standards of Act).

⁹⁶ See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 603-04 (1997) (noting that settlement agreement stipulated payment schedule based on four similar disease categories requiring medical documentation).

⁹⁷ See H.R. 1283 at § 501(4).

⁹⁸ See H.R. 1283 at § 501(2).

⁹⁹ See H.R. 1283 at § 501(3).

¹⁰⁰ See *Ortiz v. Fibreboard*, 527 U.S. 815, 825 (1999) (stating that under settlement plan, if claimant contested settlement offer following mediation, punitive damages and prejudgment interest would be unavailable at trial).

individuals who have been injured from a defective product must file suit before the applicable statute of limitations expires, whether disabled or not.¹⁰¹ As a result, a large majority of asbestos claimants who have filed suit in the court system are exposure-only claimants with no disability or serious illness.¹⁰² Under this statute, however, the statute of limitations would no longer apply to asbestos personal injury cases.¹⁰³

Claimants under this Act would also benefit from a structured system for the expedient resolution of all claims meeting the certification requirements.¹⁰⁴ In the current tort system asbestos litigation delays often stretch beyond three years.¹⁰⁵ In addition, legal costs absorb a large portion of any recovery a claimant may eventually receive.¹⁰⁶ Under the provisions of FACA, once a claim is certified the parties are ushered through a series of ADR mechanisms until either a settlement is reached or all ADR options have been exhausted.¹⁰⁷ Unlike that of traditional litigation, the

¹⁰¹ See *The Fairness in Asbestos Compensation Act, 1999: Hearings on S.758 Before the Subcomm. On Administrative Oversight and the Courts of the Comm. On the Judiciary*, 106th Cong., (Oct. 6, 1999) (statement of Christopher Edley Jr., Professor, Harvard Law School) (stating that many asbestos claimants sue because they must to avoid statute of limitations even where no impairment suffered).

¹⁰² See *Amchem v. Windsor*, 521 U.S. at 631-32 (Breyer, J., concurring) (noting that up to one-half of asbestos claims are filed by claimants with little or no physical impairment).

¹⁰³ See H.R. 1283 § 502 which states:

No defense to an asbestos claim based on a statute of limitations or statute of repose, laches, or any other defense based on the timeliness of the claim shall be recognized or allowed in any civil action or arbitration unless such claim was untimely as of the date of enactment of this Act.

Id.

¹⁰⁴ See H.R. 1283 at §§ 101-208. This legislation would establish a mandatory settlement mechanism through which all accepted claims would be required to progress before such claims may be filed in the traditional court system. As a threshold matter, the Act would establish the minimum medical standards required for acceptance of all asbestos-related personal injury claims. *Id.*

¹⁰⁵ See Judicial Conference Ad Hoc Committee on Asbestos Litigation, Report of the Ad Hoc Committee (1991) (stating that asbestos cases take an inordinately long time to reach disposition); H.R. 1283, 106th Cong. § 2 (1999) (finding that "volume and complexity of asbestos cases have resulted in the violation of basic tenet of American justice: speedy and inexpensive resolution of cases."). See generally Dutcher, *supra* note 17, at 957 (discussing customary delays associated with asbestos suits); Hensler & Peterson, *supra* note 5, at 963 (discussing problems facing asbestos claimants in current judicial system).

¹⁰⁶ See Judicial Conference Ad Hoc Committee on Asbestos Litigation, Report of the Ad Hoc Committee (1991) (recognizing that asbestos litigation has proven to be extraordinarily costly); H.R. 1283, 106th Cong. § 2 (1999) (finding that attorney's fees and litigation costs leave less than 50 percent of total cost of asbestos litigation to compensate claimants); see also Schultz, *supra* note 7, at 562 (discussing high cost of asbestos litigation). See generally JAMES S. KAKALIK ET AL., VARIATION IN ASBESTOS LITIGATION, COMPENSATION AND EXPENSES 91 (1984) (discussing high costs of asbestos litigation).

¹⁰⁷ See H.R. 1283 at §§ 301-306.

timetable for implementation of ADR under FACA would be considerably shorter, imposing mandatory mediation to begin within 60 days of acceptance of the claim¹⁰⁸ and setting the same time limit for completion of mediation.¹⁰⁹ The statute also provides for establishment of similar time restrictions on the arbitration process.¹¹⁰

CONCLUSION

The asbestos crisis has severely impaired the traditional tort system in this country. Between awards obtained by exposure-only claimants with no demonstrable impairment and punitive damage awards which often dwarf their compensatory counterparts, resources for compensating those who will become sick in the future are in serious danger of becoming depleted. Courts have made creative use of the currently existing extra-judicial methods of case aggregation and disposition with little or no success, finally imploring Congress to create a solution. After many years, Congress has responded with a proposal that would strike a balance between the rights of those already injured to seek redress in a court of law and those who, absent some legislative intervention, may never get the opportunity. The Fairness in Asbestos Compensation Act would provide the most equitable and most cost-effective solution to this ongoing saga and should be made law.

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¹⁰⁸ See H.R. 1283 at § 304.

¹⁰⁹ See H.R. 1283 at § 305(c) (mandating that mediation be completed within 60 days of commencement).

¹¹⁰ See H.R. 1283 at § 306 (mandating that claimant serve notice of election to arbitrate upon defendants within thirty days of termination of mediation).

* I would like to thank my wife, Melissa Torres-Gallegos, for her encouragement and support throughout the writing process. I would also like to thank the staff and editors of the *St. John's Journal of Legal Commentary* for their constructive comments and suggestions.